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No. 80-99 and No. 80-115

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Petitioners,

v.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS HEREIN; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM L. TAYLOR
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20064
202-832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania Street
Indianapolis, Indiana 46204

Attorneys for Respondents Indianapolis Public Schools

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether any issue warranting this Court's review is presented by petitioners' attack on the findings of the courts below:

a) that the Indiana state legislature acted with a racial purpose within the meaning of *Arlington Heights* when, contrary to previous state policy, it confined the Indianapolis public school system to its previous boundaries while acting to consolidate and reorganize other governmental functions in Marion County;

b) that state officials acted with a racial purpose within the meaning of *Arlington Heights* in deciding to locate all ten Marion County public housing projects for black families within the boundaries of the Indianapolis public school system; and

c) that these racially purposeful violations of the Equal Protection Clause of the Fourteenth Amendment contributed significantly within the meaning of *Milliken I* to the racial disparities that existed between public school enrollments in IPS and suburban Marion County school systems and required an inter-district remedy?

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STATEMENT

The basic issue remaining for final resolution in this protracted litigation is whether the lower courts exceeded their authority in determining that purposeful violations of the Equal Protection Clause of the Fourteenth Amendment have been established that call for an inter-district school desegregation remedy. Respondents, the Board of

School Commissioners of the City of Indianapolis (IPS), the United States and intervening black parents Buckley, all urged successfully below that inter-district violations had occurred which require some form of inter-district relief. Petitioners, suburban school corporations, state officials and the Housing Authority of the City of Indianapolis (HACI)[1] seek review of the decisions below on grounds that the findings of intentional constitutional violations were not supported by adequate evidence.

The findings of fact undergirding the decisions below may be summarized as follows:

1. *State involvement in intra-district school segregation.* The district court found that Indiana, unlike many other Northern and Western States, had for long periods of time sanctioned segregated public schools by state law and official policy (IPS A5-8). After this policy was formally abandoned in 1949, a racially dual system was maintained in IPS by a series of segregative actions that continued until the United States brought this action in

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[1] This brief in opposition is filed in response to the petitions of: *The Metropolitan School District of Perry Township, Marion County, Indiana* v. *Buckley, et al.*, No. 79-1975 (hereinafter Perry Petition); *Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold R. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body* v. *Buckley, et al.*, No. 79-2001 (hereinafter State Petition); *The Metropolitan School District of Lawrence, Warren and Wayne Townships, Marion County, Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana* v. *Buckley, et al.*, No. 79-2067 (hereinafter Lawrence Petition); *The School Town of Speedway, Marion County, Indiana; The School City of Beech Grove, Marion County, Indiana* v. *Buckley, et al.*, No. 80-99 (hereinafter Speedway Petition); and *The Housing Authority of the City of Indianapolis, Indiana* v. *Board of School Commissioners of the City of Indianapolis, Indiana, et al.*, No. 80-115 (hereinafter HACI Petition).

1968. During this period, the State of Indiana did "next to nothing" to dismantle the dual school system (IPS A29). On appeal, this holding was affirmed. 503 F.2d 68, 80 (7th Cir., 1974) *cert. denied*, 421 U.S. 929 (1975).[2]

2. *State support for racial discrimination in housing.* The district court also found that segregation of the public schools was buttressed by a number of historical practices of racial discrimination that contributed to the growth of segregated neighborhoods and schools in the Indianapolis area. State policies and practices which assisted private discrimination or fostered segregation directly included a racial zoning ordinance ultimately declared unconstitutional by a state court, the widespread use of racially restrictive covenants which were "routinely enforced" until 1948, police toleration of practices including violence designed to exclude blacks from white neighborhoods (IPS A2-4).

In 1971 and again in 1973, the district court found that such housing practices, along with later segregative public housing actions (discussed *infra* pp. 4-6) were principally responsible for the racial disparities in housing and school enrollments that existed in Marion County (IPS A8-9, 31-32), a finding later affirmed by the Court of Appeals (SA 22-24). While petitioners seek to minimize the significance of this finding by pointing to recent increases in minority enrollments in a few of the suburban school corporations and equating metropolitan Indianapolis with other metropolitan areas (Lawrence Petition pp. 7-8 and Perry Petition p. 11), even today, with 89% of all Marion County black public students attend-

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[2] IPS and the United States have agreed on a plan which the district court has approved for intra-district relief which provides desegregated schooling in September, 1980 for all students except those who are to be involved in the inter-district plan. Thus, no intra-district issue is presented to this Court.

ing school in IPS and ~~only 11% in~~ the suburbs, Marion County remains far more segregated than the average metropolitan area (IPS Cross-Petition p. 4, n. 2).[3]

3. *The inter-district public housing violation.* In the late 1960s, at a time when state and local officials had failed to dismantle the dual school system that existed in IPS and when state supported housing discrimination had contributed to racial disparities in school enrollments and housing in Marion County, the public housing authority (HACI), whose area of operation extends throughout almost all of Marion County[4], selected sites for ten public housing projects, all within the boundaries of IPS. (JA 13). The district court found that the decision by HACI[5] to locate all public housing facilities,[6] whose

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[3] Moreover, almost all of the increase in black enrollment in suburban schools has occurred in the Pike and Washington school corporations, two districts not involved in the current proceedings (JA 118).

[4] The specific jurisdictional limitation—"the area within [5] miles of the territorial boundaries" of the old city of Indianapolis (JA 13)—takes in almost all of Marion County.

[5] While petitioners seek to make much (Lawrence Petition, p. 14; HACI Petition, p. 9) of Judge Tone's notation, in dissent, that in some cases initial recommendations for site selection were delegated to a mayoral task force or to private developers (JA 45), it is not disputed that the ultimate responsibility for selecting sites was vested in HACI along with its fellow defendant, the Metropolitan Development Commission of Marion County (JA 13). The Metropolitan Development Commission was also implicated in the *de jure* school violation "by its refusal to allow IPS to use land in a white neighborhood for a new Attucks High School" which for decades had been the official high school for black students (JA 15).

[6] The only other public housing project—Lockfield Gardens was built in the 1930's as a racially segregated project in IPS and remained segregated until it was closed. The relevance of petitioners' claims (Lawrence Petition p. 14) that other types of governmentally subsidized housing built in suburban Marion County have black residents is unclear. Such housing was built largely in the 1970's

residents were almost exclusively black, within IPS territory had a major influence in keeping black students confined to IPS (SA 46). While petitioners say that HACI could not locate public housing in suburban Marion County without obtaining a cooperation agreement from Marion County officials, the district court found and the Court of Appeals affirmed that the lack of cooperation between these officials was part of a policy to discourage blacks from seeking to purchase or rent homes in suburban areas (SA 39-40, 26. See also IPS A 8-9).

After the remand, the district court reexamined the record relating to the location of public housing projects solely within IPS and found that the non-racial justifications offered by petitioners, e.g., the need to provide municipal services in suburban locations, were unpersuasive, particularly in view of the fact that HACI had rejected a site in Warren Township in favor of one located just across the street in IPS (JA 94).[7] As the

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and housing for blacks was made available largely in Pike and Washington Townships, the two Marion County school corporations that are not parties to this appeal (SA 108). Moreover, although the district court chose not to make findings on the specific issue, IPS adduced evidence that these other types of subsidized housing were made available principally to blacks in IPS and to whites in suburban Marion County, that the housing available to blacks in the suburbs was on a segregated basis and that additional public housing violations had occurred in the 1970's (JA 107-109).

[7] Other projects were also located in close proximity to suburban townships (JA 15). Some petitioners also urge that a lack of racial intent is evidenced by the fact that a few of the projects were located in predominantly white areas of IPS (Lawrence Petition, p. 14; Perry Petition, p. 12). But, apart from the fact that the district judge concluded that the evidence would not support a finding that these projects, which were located on the fringe of black residential areas, had an integrative effect on housing, no one disputes the finding that they had an immediate segregative impact on public schools. (See JA 51, n.45).

Court of Appeals had noted in an earlier opinion, claims of the unavailability of services had been answered by evidence that "these services could have been arranged . . . that public transportation routes could have been extended . . . that sewage services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city." (SA 11-12).

On the basis of these findings, the district court concluded that "the action of . . . official bodies in locating [public] housing projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." (JA 93-94). The Court of Appeals, while taking into account HACI's assertion that cooperation agreements with Marion County officials were needed to construct public housing in the suburbs, affirmed the district court's finding. (JA 16). Even if cooperation agreements were legally required, the requirement could affect neither the finding that HACI's policy was racially founded, since HACI had made no serious attempt to secure such agreements (JA 16), nor the finding that the resistance of suburban officials was racially based.[8]

4. *The inter-district boundary violation.* In 1969, the Indiana State legislature had to decide whether to extend

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[8] Thus, the stress placed by petitioners on the absence of a cooperation agreement and Judge Tone's description of such agreements as "neutral requirements" of law (JA 46) seems beside the point. If, simply by failing to conclude an agreement that was a "neutral requirement" of law, two parties could immunize themselves from responsibility for racially based actions the Constitution would be thwarted in numerous instances. See *Cooper* v. *Aaron*, 358 U.S. 1, 16.

the boundary lines of IPS to the borders of Marion County as part of an overall governmental reorganization and consolidation (Uni-Gov) designed to establish a new City of Indianapolis governed by a city-county council with jurisdiction over all the territory in Marion County. Given the context in which the legislature was acting—including the continued maintenance by state and local officials of a racially dual school system in IPS, the initiation of a suit in 1968 by the United states to dismantle the dual system, the involvement of government officials in historical practices of housing discrimination that contributed to the racial disparities that existed between IPS and Marion County, and the then on-going process of locating housing projects for black people only in IPS—the racial implications of the IPS boundary decision could hardly be obscure.

It was in that context, sixteen days prior to the final passage of the Uni-Gov legislation, that the legislature decided to repeal section 9 of a 1961 statute[9] providing that in counties having a city of the first class (Marion County), the extension of the boundaries of a civil city would automatically extend the boundaries of a school city, unless mutually agreed to the contrary (JA 90, 7-9). The district court found that the 1961 Act was an expression of a long-standing state policy that the boundaries of a school city and of a civil city should be coterminous, and that the repeal of the law in conjunction with the enactment of Uni-Gov was a clear substantive departure from well established state policy (JA 90-92). The court also found that no educational or governmental reason was offered for the legislative decision to exclude public schools from the reach of Uni-Gov (JA 91).

Given the historical and immediate racial contexts, the finding that the legislative decision not to extend the

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[9] Indiana Act 1961, ch. 186.

boundaries of IPS was a departure from state policy and the absence of a persuasive non-racial rationale for the decision, the district court held that the legislative actions "were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1961 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (JA 92). The Court of Appeals, after a review of each of the district court's subsidiary findings, affirmed the holding that the 1969 repeal of the 1961 Act was done with a racial purpose (JA 6-11).

Petitioners stress several points which they believe impair the validity of the findings and conclusions of the district court and the Court of Appeals. They urge, for example, that there was no departure from substantive policy because there had been instances in the past when state law authorized school and civil boundaries that were not coterminous (Perry Petition, p. 10). This ignores the fact that, as both the majority and dissenting opinions of the Court of Appeals point out (JA 7, 43 n. 32), the only significant modification of the century-old policy was the Reorganization Act of 1959 which was prompted by a specific problem—the persistence of small, inefficient school districts with inadequate tax bases—and was designed to remedy that problem by providing for the *enlargement* of school districts through consolidation.

Petitioners also make much (Perry Petition, pp. 10-11; Lawrence Petition, p. 11) of Judge Tone's observation in dissent, that the decision of a Marion County Reorganization Committee not to recommend a consolidation plan for Marion County was "powerful evidence" that the same "race neutral" reasons would have produced the same result in 1969. (JA 35). But as the majority opinion noted, the reasons for the Reorganization Committee's position in 1961 were far from clear since the

Committee had first supported consolidation and then retreated "only when strong public opposition to consolidation was encountered." (JA 10).[10] Moreover, the contexts of 1961 and 1969 decisions were strikingly different since no county-wide consolidation of government functions was pending in 1961 when the Reorganization Committee bowed to public opposition to school consolidation.[11]

Petitioners further claim (Lawrence Petition, pp. 19-20) that the Uni-Gov consolidation was not, in technical terms, an extension of Indianapolis boundaries by "civil annexation" and that therefore the boundaries of IPS would not have expanded even in the absence of repeal of section 9 of the 1961 law. Even if this reading were correct, and the Court of Appeals majority decided that it was not (JA 9), the distinction seems besides the point. No one has claimed that the Uni-Gov consolidation did not accomplish substantially the same purposes as a civil annexation; indeed the evidence was that Uni-Gov was sought in the state legislature because the local procedure for civil annexation had been thwarted (JA 38, n. 18).

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[10] While the Court of Appeals had noted in an earlier opinion that there was no evidence that this public opposition was racially motivated (SA 14), this statement was based on the district judge's observation that suburban schools had no opportunity to commit acts of discrimination since few Negroes lived within their borders (IPS A 29). But the district court had also concluded that suburban officials sought to prevent the location of black people within their jurisdictions. (IPS A 3-4). Moreover, the Reorganization Committee believed that the arguments in favor of consolidation "far outweighed" those opposed (SA 14). Thus, whether or not there was sufficient evidence to conclude that the 1961 decision was racially based and an independent inter-district violation, a moot point, there was ample basis for the conclusion of the lower courts that the 1969 decision of the legislature was not simply the product of "race neutral" actions in 1961.

[11] Nor was a county-wide consolidation pending in 1967 when the Indiana legislature first took action to repeal section 9.

Thus, even if "civil annexation" and "consolidation" were different terms of art and even if the legislature thought it was engaged in a futile act in repealing section 9, the fact would remain that the failure to include school boundaries in the Uni-Gov consolidation itself was an effective repeal of the state's policy of coterminous boundaries.[12]

Finally, petitioners (Perry Petition, p. 11) point to the testimony of persons knowledgeable about the 1969 legislative actions, including that of a black legislator, that race was not a factor. But the district court and the Court of Appeals considered this evidence (JA 11, n. 14) as they did all the other points now proffered in the petitions and concluded that it did not outweigh the more objective evidence that the decisions of the legislature not to extend the boundaries of IPS when establishing Uni-Gov was based at least partly on race.

5. *Effects of the inter-district violations.* Despite previous findings that racially segregative actions supported by government officials were principally responsible for the racial disparities in school enrollments and housing that existed in Marion County (IPS A 8-9, 31-32), the district court in its 1979 opinion felt constrained by *Dayton I* to limit its findings of effect only to current conditions of segregation that plaintiffs had demonstrated were traceable to specific individual acts of discrimination. Following this reasoning, the court discounted any

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[12] Petitioners themselves state (Lawrence Petition p. 11) that the School Annexation Act "became ineffective and without function with the passage of Uni-Gov." Petitioners also seek to minimize the broad reach of Uni-Gov by stating that it "was accomplished . . . without extending Indianapolis' more costly services" such as fire, police and sewer (Lawrence Petition p. 12). This apparently is a reference to the fact that Uni-Gov creates special service districts for such police and fire services. However, the Act establishes procedures for furnishing these services on a consolidated basis. (JA 8, 160-163).

effect of the state boundary violation [13] on grounds that Uni-Gov would not have been enacted if IPS had not been limited to its previously defined borders (JA 109). It viewed the effects of the inter-district violations as restricted to the segregative public housing actions [14], which the court attempted to quantify mathematically (JA 105-107, 117-118). These effects, the court concluded, were sufficient to justify only a one-way reassignment plan to bring each suburban district up to a 15% black enrollment. (JA 118).

The Court of Appeals found adequate proof of a systemwide violation calling for a systemwide remedy and held that the district court erred in seeking to limit remedy to the demonstrated effect of each individual act of discrimination (JA 20-21). It also found error 1) in the district court's discounting of the state boundary violation, since "[o]nce the state chose to act it was obligated to do so in a non-discriminatory manner." (JA 21-22) and 2) in the district court's holding that it had no power to order suburban students to be transferred out of their school corporations (JA 23-24). But these errors went not to whether the remedy was overbroad, but whether it was too limited, and the Court held that notwithstanding the fact that "[t]he most closely tailored remedy would likely be one that would allow IPS to expand to the city borders" (JA 22), the district court had discretion to circumscribe the remedy.

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[13] Contrary to the claim of petitioners (Perry Petition p. 9), the district court did *not* find that the Uni-Gov violation lacked "the required inter-district effect," but rather that it was impossible to measure the incremental effect of the violation. (JA 109).

[14] Petitioners' suggestion (Lawrence Petition p. 6) that the district court in its earlier 1975 opinion had made no specific finding that the siting of public housing constituted an inter-district violation is at best misleading since the court found that the "location of housing projects by [state officials] has obviously tended to cause and perpetuate the segregation of black pupils in IPS territory." (SA 39).

SUMMARY OF ARGUMENT

The petitions for writ of certiorari should be denied because petitioners have shown no basis for concluding either that the decisions of the district court and the court of appeals conflicted with constitutional standards set by this Court or that the findings of the courts below were erroneous.

To the contrary, the findings 1) that the legislature acted with a racial purpose when, contrary to previous state policy, it confined IPS to its previous boundaries while reorganizing and consolidating governmental functions in Marion County and 2) that state officials acted with a racial purpose in deciding to locate all ten Marion County public housing projects for black families within the boundaries of IPS resulted from the very kind of sensitive inquiry into the totality of relevant facts that this Court has called for in *Arlington Heights*, *Washington* v. *Davis* and other cases.

In each instance, the ultimate finding of the courts below was based not on disproportionate impact alone, but on the long history of state-sanctioned discrimination in Indiana, the immediate context of a pending effort to remedy *de jure* segregation of IPS public schools, the failure of state officials to offer persuasive nonracial justifications for their actions, and other factors. Petitioners' contentions that the courts below gave insufficient weight to certain subjective or speculative factors, e.g., whether state legislators would have been thinking of county-wide school relief in 1969 are misconceived. They run directly contrary to this Court's teaching in *Keyes*, *Arlington Heights* and other cases that the existence of racial purpose must be ascertained through the use of objective standards, rather than by probing the minds of legislators.

Petitioners' attack on the lower courts' findings of significant inter-district effects is also based on subjective and speculative assertions, e.g., that a county-wide consolidation would never have occurred if schools had been included, that black families would not have chosen to live in suburban Marion County even if public housing had been located there. To the extent they are legally cognizable at all, such claims run counter to this Court's affirmance of *Evans* v. *Buchanan* and decisions in other cases. In any event, the lower courts had ample basis for determining, in conformity with *Milliken I*, that the racial disparities between IPS and suburban Marion County public schools were due in large part to racially discriminatory state action and that the inter-district violations had effects significant enough to warrant an inter-district remedy.

ARGUMENT

Reasons Why the Writ Should Be Denied

Petitioners' effort to obtain review in this Court is couched in terms of a claimed conflict between the decisions below and constitutional standards enunciated by this Court, principally the requirement in *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) that claimed violations of the Equal Protection Clause of the Fourteenth Amendment be substantiated by findings of racial purpose, and the standard set forth in *Milliken* v. *Bradley*, 418 U.S. 747 (1974), that inter-district remedy in school desegregation cases be predicated on the establishment of an inter-district violation with significant effects. A careful reading of the petitions discloses, however, that petitioners' complaint is not that the courts below articulated incorrect standards for determining constitutional violations but that they made incorrect findings in applying

the appropriate principles to the record evidence in this case.

The distinction is of importance since this Court has declared, as a matter of wise judicial administration, that it:

> . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

See also, *Brainard* v. *Buck*, 184 U.S. 99, 105 (1902); *Blau* v. *Lehman*, 368 U.S. 408-409 (1962). While this prudential rule of deference to the lower courts does not apply to conclusions of law, *Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corporation*, 340 U.S. 147, 153-154 (1950), it does dictate acceptance, unless clearly erroneous, of inferences drawn from the facts by the lower courts. *United States* v. *Commercial Credit Co.*, 286 U.S. 63, 67 (1932).

It is the factual findings and inferences drawn by the lower courts with which petitioners quarrel here. When this Court remanded the instant case for the reconsideration in light of *Washington* v. *Davis* and *Village of Arlington Heights*, the thrust of its concern was apparent: since "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." (426 U.S. at 239), "the invidious quality of [challenged acts] . . . must ultimately be traced to a racially discriminatory purpose." 426 U.S. at 240.

The Inter-district Boundary Violation. As applied to the 1969 actions of the Indiana legislature confining IPS to its previous boundaries, this meant that unless these acts interfered with remedies for other constitutional

violations [15] they could only be deemed a violation of the

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[15] It should be pointed out that even if this Court were to determine that the lower courts' findings of racial purpose in the State's legislative actions were worthy of review, the decision below would be sustainable as a direct application of the principles of *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 459, 460 (1972) and *United States* v. *Scotland Neck*, 407 U.S. 484, 489-490 (1972).

The actions of the Indiana legislature were taken in the face of major *de jure* school violations that remained unremedied in 1969. The State itself, through actions of the General Assembly, had actively participated in the unlawful segregation of students in public schools (JA 56-57). The unremedied violations had been compounded and given an inter-district character by acts of housing discrimination, both of historical and very recent vintage in which the State had participated. (SA 23).

Against this background of prior intra- and inter-district violations, the appropriate standard for assessing the 1969 legislative actions is whether they were effective in rooting out all vestiges and completely dismantling the system of segregation or instead had the effect of perpetuating it. *Milliken* v. *Bradley*, 418 U.S. at 744; *Wright* v. *Council of the City of Emporia, supra; United States* v. *Scotland Neck, supra.* As this Court explicitly recognized in *Washington* v. *Davis*, in such "circumstances, the racial impact of a law [or act] rather than its discriminatory purpose, is the critical factor . . . [because] there [is] no need to find an 'independent constitutional violation.'" 426 U.S. at 243, quoting from *Wright, supra*, 407 U.S. at 459.

Further, even if there were merit to petitioners' claims that the lower courts' findings of racial purpose were inadequate *both* as to the 1969 legislative actions *and* discriminatory housing actions, the decisions below might still be sustained on other grounds. In his concurrence in *Milliken*, Mr. Justice Stewart stated that inter-district relief could be ordered where state officials "contributed to the separation of the races by drawing or redrawing school district lines." 418 U.S. at 755. This suggests strongly that state boundary actions, even when unaccompanied either by racial purposes *or* by other inter-district violations, may be invalidated when they are taken in the face of an uncorrected constitutional violation.

Of course, this Court need consider these independent bases for sustaining the decisions below *only* if it determines that peti-

Fourteenth Amendment on a proper finding that they were undertaken with a racial purpose. Such a determination may not ordinarily be based on disproportionate racial impact alone (426 U.S. at 242), but calls for a "sensitive inquiry" (429 U.S. at 266) into the "totality of relevant facts." 426 U.S. at 242.

This is precisely the inquiry that the lower courts conducted. Applying relevant decisions of this Court, the district court did not rest its finding solely on disproportionate impact or any other single factor. Rather, the court, after carefully examining the record, properly based its findings of racial intent on the total context of the legislature's action including the historical background, sequence of events, substantive departures, justifications proferred and ultimate effects. *Reitman* v. *Mulkey*, 387 U.S. 369, 373 (1967); *Washington* v. *Davis*, 426 U.S. at 241-242; *Arlington Heights*, 429 U.S. at 269.

The Court of Appeals reviewed each of the subsidiary bases for the ultimate finding of racial purpose.[16] The Court noted the relevance of historical factors and the immediate legislative context, including the State's longtime involvement in racially discriminatory school and housing actions, the persistence of *de jure* segregation and the pendency of this desegregation litigation (JA

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tioners' claim that the findings of racial purpose are clearly erroneous warrants review.

[16] While petitioners (Perry Petition pp. 13-14; Lawrence Petition pp. 6-7) seize on wording in the 1978 remand to suggest that the court then believed that the existence of racial intent could not be determined without supplementation of the record and then changed its mind in 1980, when the language of the remand is read in context it is clear that this is not so. The court's direction to the district judge was "to make further findings of fact from evidence already in the record *or, if necessary* as supplemented by additional evidence. (JA 58) [emphasis added]. Thus, when the court sustained new findings of racial intent based on the existing record it was not a "metamorphosis" or change of mind.

6-7). In upholding the finding that the legislature substantially departed from an established policy of coterminous boundaries, the Court took into account petitioners' claims that the policy had been deviated from previously but pointed out that the exceptions had favored the creation of larger, not smaller school districts. (JA 7-8). In examining petitioners' claim that the 1961 recommendation of the Marion County Reorganization Committee against county-wide school consolidation showed a non-racial purpose, the court took into account both the changed circumstances (the pendency of a county-wide government reorganization) and the fact that the reasons for the Reorganization Committee's shift to a position opposing school consolidation were unclear (JA 9-10). In an earlier opinion, the Court had noted that the Reorganization Committee's report had considered all of the educational objections to consolidation—claims that large size would inhibit innovation and lead to a loss of local control and potential unresponsiveness to local school communities—and found them unpersuasive. (SA 14). Notwithstanding the absence of articulated educational reasons for departing from the state policy of coterminous boundaries in a context with manifest racial implications, the court did not discount the possibility that the freezing of IPS boundaries was in part a response to sentiment for smaller school units. It concluded only that the existence of such a non-invidious rationale would not in the circumstances negate the finding of a racial purpose (JA 10-11). In so holding the court acted in conformity with the *Arlington Heights* dictum that even if nonracial factors are shown, the burden rests with defendants to demonstrate that the same decision would have been reached in the absence of racial considerations. 429 U.S. at 270, n. 21.

Petitioners' other principal objections appear to be that the courts below gave insufficient weight to their assertion that legislators acting in 1969 would not have

been thinking of the possible involvement of the suburbs in a desegregation remedy (Speedway Petition, pp. 21-22; Perry Petition, pp. 10, 11; Lawrence Petition, p. 23) and to the post-hoc testimony of one state legislator and other participants in Uni-Gov that race was not on their minds (Perry Petition, p. 11). Their reliance on these speculative and subjective matters ignores the teaching of this Court that the existence of intent is to be determined through the use of objective standards rather than probing the minds of legislators. *Keyes* v. *School District No. 1 of Denver*, 413 U.S. 189, 207 (1973); *Washington* v. *Davis*, 426 U.S. at 242 (Mr. Justice Stevens concurring); *Arlington Heights*, 429 U.S. at 267; *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 467-468 (1979); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 541 (1979).

The Inter-district Public Housing Violation. In determining the racial purpose of actions restricting the location of public housing projects to IPS, the district court employed the same type of analysis, governed by the standards of *Reitman*, *Washington* and *Arlington Heights* that it utilized in assessing the 1969 legislative actions. Although the confinement of public housing to IPS had a manifest segregative impact on public schools (IPS A 8-9; SA 24), the Court did not rely on racial impact alone. Instead, it considered the historical background, the non-racial justifications proferred by defendants and other relevant factors on which evidence was offered before reaching its conclusions.

In examining the historical context in which the public housing siting decisions were made, the district court appropriately relied on its prior findings of practices of housing discrimination, practices in which government officials were significantly involved. (IPS A 8-9). In evaluating non-racial justifications offered for the segregative siting decisions—claims that the decisions were

dictated by costs or the unavailability of services—the court relied on prior determinations that such claims were unfounded in fact.[17] See Statement, *supra*, pp. 5-6. The Court of Appeals again reviewed these subsidiary findings in upholding the district court's ultimate finding that the siting decisions were racially motivated (JA 11-16).

Petitioners' attack on the determination of racial intent focusses in part on approving references by the courts below to the objective "foreseeability" standard employed in *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir., 1974) (Lawrence Petition, pp. 20-21). Their suggestion that consideration of this factor was inconsistent with *Dayton II* is simply wrong since this Court said that the foreseeable consequence of an action is "one type of quite relevant evidence of racially discriminatory purpose." 443 U.S. 526, 536 n.9 (1979). This is clearly the use that the courts below made of the *Oliver* test here.

Petitioners *are* correct in asserting (Perry Petition, pp. 18-19) that this Court has not explicitly decided whether state supported housing discrimination, *standing alone*, provides a basis for school desegregation relief and that Mr. Justice Stewart's statement in concurrence in *Milliken I* (418 U.S. at 755) that an inter-district remedy may be warranted where state officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws" is dictum. But petitioners fail to note that the decisions below are an application of the principle of

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[17] Petitioners' suggestion (Lawrence Petition pp. 25-26) that under *James* v. *Valtierra*, 402 U.S. 137 (1971) the mere invocation of costs as an excuse for rejecting public housing immunizes the action from a finding of racial intent is curious. In *James* there was no claim, much less a holding, that the actions of government officials were aimed at a racial minority.

Cooper v. *Aaron*, 358 U.S. at 15-16, that the constitutional right to equal treatment in public education may not be frustrated indirectly by the acts of state officials other than those who assign students to schools [18]; that this Court has specifically recognized the interlocking character of segregative state actions in schools and housing (see, e.g., *Swann* v. *School Board of Charlotte-Mecklenburg*, 402 U.S. 1, 20-21, 1971; *Keyes*, 413 U.S. at 202); and that this Court has stated that the actions of non-school authorities in deliberately attempting to fix or alter demographic patterns may in some circumstances warrant a school desegregation remedy. *Swann*, 402 U.S. at 32. Moreover, while appropriate circumstances may arise for this Court to address more specifically the issue of whether housing violations alone justify the grant of a school desegregation remedy, this case —involving so much evidence of school violations by state and local education officials (see Statement, *supra*, pp. 2-3) and of state boundary violations (see Statement, *supra*, pp. 6-10)—hardly provides such an occasion.

Inter-district Effects. A final set of contentions by petitioners is that even if the state boundary actions and public housing actions were actuated by a racial purpose, they lacked the significant inter-district effect required by *Milliken I*. One such assertion—the speculative claim that Uni-Gov would never have been enacted if school boundary expansion was mandated (Lawrence Petition, p. 13)—is refuted by the Court of Appeals' observation that "[o]nce the state chose to act it was obligated to do so in a non-discriminatory manner" (JA 21-22). Moreover, petitioners fail to come to grips with the fact that in an almost identical situation, this Court affirmed a

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[18] As noted earlier, a proper application of the principles of *Cooper* v. *Aaron* also disposes of petitioners' claim that the failure of other state officials to execute a cooperation agreement, assuming one was required, excuses HACI's racial siting decisions. See Statement, *supra*, p. 6 n.8.

holding that a state statute which merely limited the authority of state education officials to reorganize school districts in New Castle County, Delaware was constitutionally infirm even though the authority might never have been exercised. *Evans* v. *Buchanan*, 393 F.Supp. 428 (D. Del., 1975), *aff'd* 423 U.S. 963 (1975).[19]

An allied claim by petitioners is that effect is lacking because a desegregation remedy involving the suburbs would not have been mandated even if the boundaries of IPS had expanded in 1969 (Perry Petition, pp. 15-17). But petitioners have no basis for contending that the suburbs would have been deemed under *Keyes* "separate identifiable" areas that could not have been affected by pre-1970 violations. In *Penick*, the Columbus Board argued assiduously that since its boundaries had grown substantially through annexation after 1954, recently annexed areas could not have been implicated in pre-1954 violations. But this Court, holding that after 1954 Columbus was under a continuing duty to disestablish its dual system (443 U.S. 449, 458 [1979]), sustained systemwide relief that did not exempt areas annexed after 1954. Further, even if petitioners were correct in their

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[19] The lower courts subsequently determined that this and other inter-district violations warranted school district consolidation and a county-wide school desegregation remedy and this Court denied review. 416 F.Supp. 328 (D. Del., 1976), *aff'd* 555 F.2d 573 (3rd Cir., 1977), *cert. denied*, 434 U.S. 880 (1977); 447 F.Supp. 982 (D. Del., 1978), *aff'd* 582 F.2d 750 (3rd Cir., 1978), *cert. denied*, —— U.S. ——, 64 L.Ed. 2d 278 (1980). While Mr. Justice Rehnquist's dissent from the most recent denial called for review of the "Draconian" remedy of dissolving 11 school boards, he accepted as settled the finding that there was an inter-district violation warranting an inter-district remedy. *Id.* at 279. Nor is there any conflict in circuits. In *Armour* v. *Nix*, the only inter-district violation found was a housing violation that terminated in 1972 and the lower court found insufficient evidence that its effects persisted. —— F.Supp. —— (Mimeo. Op. p. 32, CA 16708, N.D. Ga., Sept. 24, 1979); *aff'd.*, 48 U.S.L.W. 3732, May 12, 1980).

contention that a county-wide remedy would not have been *mandated*, IPS would have had *authority* to implement a desegregation plan covering its expanded area. *Swann* at 16. The Court of Appeals was clearly correct then in concluding that the 1969 legislative actions curtailed the power of IPS to remedy its own violations. (JA 64-65).

As to the effect of racially motivated housing decisions, petitioners suggest without evidence (Speedway Petition p. 19; HACI Petition p. 15) that even if suburban sites had been selected, black families would not "have been transplanted" to them. Aside from the racist connotations of such a "blacks prefer to live among their own" thesis, petitioners are in conflict with the assertions they make elsewhere that when subsidized housing opportunities were provided in the suburbs, black people made use of them. (Lawrence Petition, p. 14; HACI Petition p. 9; Perry Petition p. 12; Speedway Petition p. 19; State Petition p. 26).

In short, petitioners have presented no argument which impairs the lower courts' findings that the inter-district violations had significant inter-district effects (JA 64-65) and that taken together with the continuing maintenance by state and local officials of intra-district school segregation and with other state acts of housing discrimination, the inter-district violations constituted a systemwide violation necessitating a systemwide remedy. (JA 20-21). As with their challenges to the findings of racial purpose in the 1969 legislative boundary actions and the housing siting decisions, petitioners do not demonstrate that the lower courts deviated from constitutional standards established by this Court or that the findings made were erroneous. At the very most, petitioners can claim only that they presented arguments or evidence that might have permitted the lower courts to reach contrary conclusions. In a case where the lower courts have taken

scrupulous care to evaluate the evidence in light of the standards in *Milliken I*, *Arlington Heights*, *Washington* v. *Davis* and other applicable decisions, such assertions can hardly suffice to invoke this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. TAYLOR
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20064
202-832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania Street
Indianapolis, Indiana 46204

Attorneys for Respondents